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Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor v Ann Joo Steel Sdn Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-01(A)-372–09 OF 2016 AND P-02(IM)-1649–09 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND KAMARDIN HASHIM JJCA
C 20 SEPTEMBER 2017

Land Law — Boundary dispute — Dispute over area of lot — Whether High Court had power or jurisdiction to hear appeal against decision of board purportedly filed under s 19 of the Act — National Land Code (Penang and Malacca Titles) Act 1963 ss 15, 16, 27(3), 29(1)

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This was an appeal against the decision of the learned judicial commissioner ('the learned JC') in respect of an application under O 14A/O 33 of the Rules of Court 2012. The respondent was dissatisfied with the determination of the E boundary of Lot 78 according to traverse mark as opposed to high water mark which resulted in the respondent losing the area between the two marks ('the disputed land'). The respondent applied to the Director of Land Titles pursuant to s 28(1) of the National Land Code (Penang and Malacca Titles) F Act 1963 ('the Act') contending that the boundary should be measured based on the high water mark. The respondent's application was dismissed. Dissatisfied, the respondent appealed to the Land Titles Appeal Board ('the board') under s 15 of the Act. Before the board, the appellants contended that the respondent could not appeal against the decision and the respondent's G appeal was dismissed. Against the decision of the board, the respondent appealed to the High Court under s 19 of the Act. The High Court, on 22 September 1995, allowed the respondent's appeal and ordered the case be remitted to the District Commissioner for Land Titles to conduct an inquiry to determine the boundary of Lot 78. Pursuant to the order of the High Court, H the deputy director co nducted an inquiry where it was decided that the boundary of Lot 78 should be measured in accordance with the high water mark ('the second decision'). In 2005 however, the Director of Land and Mines informed the appellant that the department had agreed with the first decision. In 2010, the respondents filed a civil suit in the High court which was decided I in their favour by the learned JC. The issue for consideration by the court was whether the High Court had the power or jurisdiction to hear the appeal against the decision of the board which was purportedly filed under s 19 of the Act.

Held, allowing the appeal with costs and setting aside the order of the learned JC:

(1) Pursuant to ss 27(3) and 29(1) read with s 15 of the Act, it could be seen that those sections provide that the decision of the director in respect of boundaries was final and conclusive. Therefore, there could be no appeal from the decision of the director to the board on the ascertainment of boundary of Lot 78 (see para 58).

(2) The court disagreed with the learned JC that the High Court had jurisdiction to grant the order dated 22 September 1995 as the High Court had all the powers of the body appealed from and in this case, the board, which had the power to review, vary or set aside its decision under s 21 of the Act. Section 21 of the Act was not applicable to the facts of this case. The order of the High Court dated 22 September 1995 ('the 1995 order') and the remittance by the High Court for the matter to be re-determined by the commissioner did not fall under any of the circumstances enumerated under paras (a)–(d) of s 21 of the Act (see paras 64–65).

(3) The High Court lacked jurisdiction to hear the appeal and to grant the 1995 order. The 1995 order was contrary to statutory provision. The order and by extension, the second decision were null and void (see para 72).

(4) The learned JC erred in concluding that there was no element of illegality in the 1995 order without properly considering ss 15, 16 and 27(3) of the Act which expressly excluded appeal (see para 77).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan pesuruhjaya kehakiman yang bijaksanan ('PK yang bijaksana') berkaitan permohonan di bawah A 14A/A 33 Kaedah-Kaedah Mahkamah 2012. Responden tidak puas hati dengan penentuan terhadap sempadan Lot 78 mengikut *traverse mark* bertentangan tikas air pasang yang mana mengakibatkan responden rugi kawasan di antara kedua-dua tanda ('tanah-tanah yang dipertikaikan'). Responden memohon kepada Pengarah Hakmilik Tanah berikutan s 28(1) Akta Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963 ('Akta') dengan berhujah bahawa sempadan patut diukur berdasarkan atas tikas air pasang. Permohonan responden ditolak. Tidak puas hati, responden merayu kepada Lembaga Rayuan Hakmilik Tanah ('lembaga') di bawah s 15 Akta. Di hadapan lembaga, perayu-perayu berhujah bahawa responden tidak dapat merayu terhadap keputusan tersebut dan rayuan responden ditolak. Responden merayu kepada Mahkamah Tinggi terhadap keputusan lembaga di bawah s 19 Akta. Mahkamah Tinggi, pada 22 September 1995, membenarkan rayuan responden dan mengarahkan kes diremit kepada Pesuruhjaya Daerah Hakmilik Tanah untuk melakukan siasatan untuk menentukan sempadan

Lot 78. Berikutan perintah Mahkamah Tinggi tersebut, timbalan pengarah melakukan siasatan di mana ia diputuskan bahawa sempadan Lot 78 patut diukur mengikut tikas air pasang ('keputusan kedua'). Walau bagaimanapun pada tahun 2005, Pengarah Tanah dan Galian memberitahu perayu bahawa jabatan telah bersetuju dengan keputusan pertama. Pada tahun 2010, responden-responden memfailkan tindakan sivil di Mahkamah Tinggi yang kemudiannya PK yang bijaksana memutuskan memihak kepada mereka. Isu untuk pertimbangan oleh mahkamah adalah sama ada Mahkamah Tinggi mempunyai kuasa atau bidang kuasa untuk mendengar rayuan terhadap keputusan lembaga yang mana didakwa difailkan di bawah s 19 Akta.

Diputuskan, membenarkan rayuan dengan kos dan mengenepikan perintah PK yang bijaksana:

(1) Berikutan kepada ss 27(3) dan 29(1) dibaca bersama dengan s 15 Akta, ia dapat dilihat bahawa sesksyen-seksyen tersebut memperuntukkan bahawa keputusan pengarah berkaitan sempadan-sempadan adalah muktamad dan konklusif. Oleh itu, tidak boleh terdapat rayuan daripada keputusan pengarah kepada lembaga atas penentuan sempadan Lot 78 (lihat perenggan 58).

(2) Mahkamah tidak bersetuju dengan PK yang bijaksana bahawa Mahkamah Tinggi mempunyai bidang kuasa untuk memberikan perintah bertarikh 22 September 1995 kerana Mahkamah Tinggi mempunyai kesemua kuasa badan yang merayu dan dalam kes ini, lembaga, yang mempunyai kuasa untuk menyemak semula, pelbagai atau mengenepikan keputusannya di bawah s 21 Akta. Seksyen 21 Akta tidak digunapakai kepada fakta kes ini. Perintah Mahkamah Tinggi bertarikh 22 September 1995 ('perintah 1995') dan pemindahan oleh Mahkamah Tinggi untuk perkara tersebut ditentukan semula oleh pesuruhjaya tidak terangkum di bawah mana-mana keadaan yang disebut di bawah perenggan (a)–(d) s 21 Akta (lihat perenggan 64–65).

(3) Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar rayuan dan untuk memberikan perintah 1995. Perintah 1995 adalah bertentangan peruntukan statutori. Perintah tersebut dan dengan melanjutkan, keputusan kedua adalah tak sah dan batal (lihat perenggan 72).

(4) PK yang bijaksana terkhilaf dalam memutuskan bahawa tidak terdapat elemen ketaksahan di dalam perintah 1995 tanpa dengan mempertimbangkan secara betul ss 15, 16 dan 27(3) Akta yang mana secara nyata mengecualikan rayuan (lihat perenggan 77).]

Notes

For a case on dispute over area of lot, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2753.

Cases referred to

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771; [2008] 5 CLJ 1, FC (refd)

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549; [1995] 3 CLJ 485, FC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (folld)

Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd [2017] 2 MLJ 697, FC (refd)

Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor [2005] 2 MLJ 493, CA (refd)

Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v Bagan Serai Housing Estate Sdn Bhd [2016] 5 MLJ 674; [2016] 8 CLJ 846, CA (refd)

Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1, FC (refd)

Sushil Kumar Mehta v Gobind Ram Bohra 1990 SCC (1) 193, SC (refd)

Tengku Ismail bin Tengku Sulaiman (suing as father of Tengku Iskandar Shah bin Tengku Ismail, deceased) & Ors v Sia Cheng Soon & Anor [2006] 5 MLJ 228, CA (refd)

Yuill v Wilson (Inspector of Taxes) [1980] 1 WLR 910, HL (refd)

Legislation referred to

Contracts Act 1950 s 66
Limitation Act 1953 s 9(1)
Malay Reservation Enactment (FMS Cap 142) s 13
National Land Code (Penang and Malacca Titles) Act 1963 ss 9, 9(1)(a), 15, 16, 16(b), 19, 19(1), 21, 25, 27, 27(3), 28, 28(1), (3), 29, 29(1), 30
National Land Code ss 49, 418
Public Authorities Protection Act 1948 s 2
Rules of Court 2012 O 14A, O 14A r 1, O 33, O 33 r 2, O 53
Rules of the High Court 1980 O 42 r 14

Appeal from: Civil Suit No 22–274 of 2010 (High Court, Penang)

Karin Lim (Dominic Pillai, Charanjit Singh and Noor Adzraii Noor Azhar with him) in Civil Appeal No P-01(A)-372–09 of 2016 for the appellants.

Steven Thiru (David Mathew and Hadi Mukhlis with him) (Shook Lin & Bok) in Civil Appeal No P-02(IM)-1649–09 of 2016 for the appellant.

Lim Chee Wee (Nimalan Devaraja with him) (Skrine) in Civil Appeal Nos P-01(A)-372–09 and P-02(IM)-1649–09 of 2016 of 2016 for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] There were two appeals before us arising from the decision of the learned judicial commissioner ('JC') of the High Court at Penang in respect of an application under O 14A/O 33 of the Rules of Court 2012 ('the ROC').

[2] The appellants in Appeal No P-01(A)-372–09 of 2016 were Pengarah Tanah dan Galian Negeri Pulau Pinang and Mohd Noor bin Rejab while the appellant in Appeal No P-02(IM)-1649–09 of 2016 was Tenaga Nasional Bhd. The respondent in both the appeals was Ann Joo Steel Bhd.

[3] Ann Joo was the plaintiff in the High Court while Tenaga Nasional Bhd, Pengarah Tanah dan Galian Pulau Pinang and Mohd Noor bin Rejab were the first, the second and the third defendants, respectively. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[4] In 1962, the State Government of Pulau Pinang allowed the first defendant's predecessor in title, Lembaga Letrik Negara to reclaim 58 acres of land from the sea ('the reclaimed land'), adjacent to Lot 78, Seberang Perai Tengah, Bandar Prai, Pulau Pinang ('Lot 78'). The reclaimed land was for the purpose of building a power station, known as the Prai Power Station. The construction of Prai Power Station was completed in 1967. The first defendant occupied the reclaimed land on a temporary occupation licence.

[5] Lot 78 was originally owned by Prye (Penang) Syndicate Limited. The plaintiff (formerly known as Malayawata Steel Ltd) purchased Lot 78 from Prye (Penang) Syndicate Ltd on 29 January 1962.

[6] The plaintiff applied to the Collector of Land Revenue to determine the boundary of Lot 78. On 10 December 1970, the collector determined the boundary of Lot 78 based on traverse mark as opposed to high water mark.

[7] The plaintiff was dissatisfied with the determination of the boundary according to traverse mark, which resulted in the plaintiff losing the area between traverse mark and high water mark ('the disputed land'). The disputed land would belong to the plaintiff if the boundary of Lot 78 is measured according to the high water mark, whereas if it was measured according to traverse mark, the disputed land would remain state land.

[8] Contending that the boundary should be measured based on High Water

Mark, the plaintiff applied to the Director of Land Titles pursuant to s 28(1) of the National Land Code (Penang and Malacca Titles) Act 1963 ('the Act'). A

[9] On 22 July 1985, the Deputy Director of Land Titles ('the Deputy Director') dismissed the plaintiff's application. It was held that the boundary was to be determined by traverse mark ('the first decision'). B

[10] Dissatisfied with the first decision, the plaintiff appealed to the Land Titles Appeal Board ('the board') under s 15 of the Act. Before the board, the defendants took the position that the plaintiff could not appeal against the decision of the deputy director. The board agreed with the defendants and found, as provided for under ss 28(3), 27(3) and 15 of the Act, that the decision of the deputy director in respect of the boundary was final and was not subject to appeal. The plaintiff's appeal was dismissed on 8 December 1988. C D

[11] Against the decision of the board, the plaintiff appealed to the High Court under s 19 of the Act. On 22 September 1995, T Selventhiranathan J (as he then was) allowed the plaintiff's appeal and ordered that the case be remitted to the District Commissioner for Land Titles for an early enquiry to be conducted to determine the boundary of Lot 78 'selaras dengan undang-undang'. No appeal was filed by the defendants against the order of the High Court dated 22 September 1995. E

[12] Pursuant to the order of the High Court dated 22 September 1995, the deputy director conducted an enquiry, which was participated by the defendants. On 16 April 1998, the deputy director decided that the boundary of Lot 78 should be measured in accordance with high water mark ('the second decision'). F G

[13] On or about 30 August 1999, the first defendant applied for alienation of the reclaimed land (but excluding the disputed area/land). The issue document of title for the reclaimed land was issued (known as PT 10) to the first defendant on or about 27 August 2004. H

[14] By a letter dated 19 April 2005, the Director of Land and Mines informed the first defendant that the department agreed with the first decision. As a result, on or about 14 November 2005 the first defendant made an application to the state authority for alienation of the disputed land. The application was approved via PT 11. The first defendant paid a premium of RM5,647,822 on or about 14 May 2007. I

[15] On 22 April 2010, the plaintiff filed a civil suit in the High Court against the defendants seeking for the following reliefs:

(a) a declaration that the issuance of title by the state authority to the first defendant granting part of the land measuring 7.22 acres in respect of Lot No 78, Seberang Perai Tengah, Bandar Prai, Pulau Pinang ('the land') is null and void;

(b) a declaration that the plaintiff holds the legal title to the said land and the boundary of the land is to be measured based on high water mark;

(c) a declaration that the first defendant is liable for trespass on the land;

(d) an order that the first defendant ought to vacate the said land which is being trespassed on and to repair and/or to restore the said land to original condition prior to the trespass;

(e) an order that the second defendant is to amend the register of titles and/or to take all necessary steps to reflect that the land is measured based on high water mark as shown in Plan No 5440; and

(f) an order that the first defendant is liable for losses and damages to be assessed.

[16] The defendants denied the plaintiff's claim. The first defendant pleaded that the land did not at any material time belong to the plaintiff. The first defendant further pleaded that the decision of the High Court dated 22 September 1995 and the second decision of the deputy director dated 16 April 1998 was a nullity as it was made in excess of its power and jurisdiction and as such the defendants may in law ignore the same and/or collaterally attack the same in its defence against the plaintiff's claim.

[17] Likewise, the second and the third defendants in their statement of defence took the position that the decision of the High Court dated 22 September 1995 and the second decision of the deputy director were made without jurisdiction. Taking the date of the second decision on 16 April 1998 and the filing of the writ on 22 April 2010, the second and third defendants also pleaded that the plaintiff's claim was barred by limitation under s 9(1) of the Limitation Act 1953.

[18] The plaintiff filed an application under O 14A r 1/O 33 r 2 of the ROC for the High Court's determination of the following questions:

(1) Whether the decision of the Deputy Director of Land Titles, Penang dated 16.4.1998 ('the 2nd Decision') is final and conclusive with respect to the area of Lot No. 78, Seberang Perai Tengah, Bandar Prai, Pulau Pinang ('the Land') and the boundary of the Land to be measured based on High Water Mark ('HWM');

(2) Whether the 2nd Decision prevails over and/or supersede the decision of the Deputy Director of Land Titles, Penang dated 10.12.1970 and/or 22.7.1985 ('1st Decision') that the boundary of the Land is measured based on Traverse Mark ('TM');

(3) If questions (1) and (2) above are answered in the affirmative:

(a) Whether the Plaintiff is the legal, beneficial and registered owner of the Land which include the area measured based on HWM;

(b) Whether the purported Temporary Occupation Licenses issued by the 2nd Defendant to the 1st Defendant are null and void;

(c) Whether the 1st Defendant is liable for trespass on the Land;

(d) Whether the 1st Defendant ought to vacate that part of the Land which is being trespassed on and to repair and/or restore the said part of the Land to its original condition prior to the trespass;

(e) Whether the 2nd Defendant is to amend the Register of Titles and/to take all necessary steps to reflect that the Land is measured based on HWM as shown in Plan No 5440; and

(f) Whether the Defendants are liable for losses and damages to be assessed suffered by the Plaintiff.

[19] The learned JC decided in favour of the plaintiff. The questions, which parties agreed were suitable for determination without a full trial, were answered in the affirmative.

[20] Insofar as it concerned the order of the High Court dated 22 September 1995, His Lordship found:

(a) that none of the defendants filed an application to set aside the defective High Court order as alleged by them and in that regard, failed to comply with O 42 r 14 of the Rules of the High Court 1980/the ROC;

(b) the order dated 22 September 1995 was made in the presence of all parties. The order has been drawn up, extracted and perfected;

(c) there was no indication that the order on 22 September 1995 was made without or in excess of jurisdiction, the order dated 22 September 1995 could not therefore be set aside;

(d) the order dated 22 September 1995 was not null and void on ground of illegality in terms of judgment of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 as there was no contravention of the Act;

(e) the powers of the High Court to hear the appeal was provided for under ss 15, 16 and 19(1) of the Act;

(f) that while there can be no appeal on a question of fact, the appeal before the High Court was on a point of law;

(g) since no appeal has been filed by the defendants against the decision of the High Court dated 22 September 1995, it does not stand to reason that the decision be considered invalid and inoperative;

(h) the High Court would not have entertained the appeal, unless the appeal was on a point of law and ex facie, the order dated 22 September 1995 contained words which show that the complaint in the appeal was on a point of law;

(i) the High Court had the power to remit the case to the Director of Land Titles for consideration according to law;

(j) the High Court, like the board and the Director of Land Titles, had the power to review, vary and set aside their own decision under s 21 of the Act; and

(k) since there was no element of illegality involved in the granting of the order dated 22 September 1995, the order cannot be set aside as the court was *functus officio*.

[21] In respect of the second decision, the learned JC found that as it was reached pursuant to the enquiry directed by the High Court vide the order dated 22 September 1995, the second decision was valid. Furthermore, in the absence of any appeal by the defendants against the second decision, the second decision enjoyed full legal effect, was final and conclusive with respect to the area of Lot 78 and had superseded the first decision.

[22] Consequently, judgment was entered for the plaintiff in the following terms, with costs:

(a) the plaintiff is the registered beneficial owner and/or legal title of the land measured up to the boundary of high water mark;

(b) the temporary occupation licence issued by the second defendant to the first defendant is null and void;

(c) the first defendant is liable for trespass to the plaintiff and damages to be assessed;

(d) the plaintiff is entitled to vacant possession of the disputed area; and

(e) the second defendant is required to amend the issue document of title of the plaintiff's land to reflect the boundary to high water mark.

[23] Aggrieved by the decision of the learned JC, the defendants appealed to this court. We had unanimously allowed the appeals. We now give our reasons.

THE APPEAL

[24] It was submitted for the first defendant that the learned JC had fallen into two critical errors, firstly, in equating s 19(1) appeal on point of law to a full blown appeal on points of facts and secondly, in the remittance. Relying on *Yuill v Wilson (Inspector of Taxes)* [1980] 1 WLR 910; *Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2005] 2 MLJ 493, learned counsel submitted that if the matter was to be sent back, it ought to be remitted to the board, ie the next tier and it is for the board to relook at the decision of the deputy director, which was not done in the instant appeal.

[25] It was further submitted that the learned JC erred in failing to consider the importance of the first decision, namely its finality as provided for under the Act.

[26] As regards s 19(1) of the Act, learned counsel submitted that it is only concerned with appeals to the High Court on a point of law from any decision of the board. Section 19(1) does not provide for a re-hearing of questions of fact that were before the board. A dispute on the boundary was a question of fact. Thus it was not open to the High Court, in the exercise of its s 19(1) jurisdiction, to upset or to interfere with the findings of fact before the board by the deputy director that led to the first decision.

[27] As the plaintiff's appeal was not directed at the decision of the deputy director, it would follow that the appeal was not intended to reverse the findings of fact made by the director whose findings of fact and the merits of the first decision are to be regarded as unassailable.

[28] It was further contended, on the authority of *Badiaddin*, that the first defendant through their defence to the plaintiff's claim, can mount a collateral attack on the High Court order dated 22 September 1995 as it was in breach of the Act and a nullity.

[29] The second and the third defendants advanced similar arguments on the finality of the first decision; the incompetent appeal before the board; the effect of the High Court order dated 22 September 1995 and the second decision. The recourse for judicial review under O 53 of the ROC which was not resorted to by the plaintiff was also addressed by the second and the third defendants.

[30] Citing the Indian case of *Sushil Kumar Mehta v Gobind Ram Bohra* 1990 SCC (1) 193, learned counsel for the second and third defendants submitted that jurisdiction cannot be conferred by consent or waiver. And it

matters not that the second and the third defendants participated in the enquiry which led to the second decision if the order of the High Court dated 22 September 1995 is a nullity.

[31] As for the order of the High Court remitting the case to the commissioner, learned counsel argued that it is not permissible under the Act and that remittance by the High Court does not fall under s 21 of the Act.

[32] The second and the third defendants raised two additional points not raised in the High Court, namely the issue of limitation under the Public Authorities Protection Act 1948 ('the PAPA') and s 418 of the National Land Code ('the NLC').

[33] Paragraph 35(a) of the amended statement of claim was highlighted wherein the plaintiff prayed for the following relief:

> (a) suatu perisytiharan bahawa pemberian hakmilik oleh Pihak Berkuasa Negeri Pulau Pinang kepada Defendan Pertama ('D1') sebahagian daripada tanah di bawah pegangan (holding) no 78, Seberang Perai Tengah, Bandar Prai, Pulau Pinang ('Tanah P') seluas 7.220 ekar ialah tidak sah dan terbatal (null and void);

[34] In this regard, the second and third defendants contended that the plaintiff had failed to avail itself of the mandatory appeal procedure in respect of the decision of the state authority to alienate the disputed land, PT 11 to the plaintiff. In the event the plaintiff was aggrieved by the decision of the state authority, the plaintiff should have appealed against the same by virtue of s 418 of the NLC which the plaintiff failed to do. On the authority of *Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v Bagan Serai Housing Estate Sdn Bhd* [2016] 5 MLJ 674; [2016] 8 CLJ 846, learned counsel argued that the plaintiff is barred from challenging the decision of the state authority to alienate PT 11 to the plaintiff.

[35] PAPA was raised in relation to the second decision dated 16 April 1998. The second and the third defendants submitted that as the plaintiff failed to commence the action within 36 months as stipulated under s 2 of the PAPA, the plaintiff is barred from enforcing the second decision. In the alternative, the challenge to the state authority's decision to alienate PT 11 to the first defendant is similarly barred by s 2 of the PAPA.

[36] On the point of trespass, it was contended for the second and the third defendants that the issuance of the temporary occupation licence and the alienation of the land to the first defendant was valid and in accordance with law. Reference was made to *National Land Code A Commentary* (2nd Ed) on s 49 of the NLC by Judith Sihombing where the learned author wrote:

> Where the area of a lot of alienated land is reduced as a result of encroachment of the sea or a river, the proprietor loses the area encroached. Where the sea or river recedes so as to increase the area of a lot of alienated land, the proprietor does not gain the increased area as alienated land but instead the increased area becomes state land unless the Director of Survey otherwise provides. The common law principle of accretion, whereby an area of land, formed by the gradual and imperceptible recession of the land, does not apply under the Code ...
>
> > Where encroachment has occurred the registered proprietor will not be able to rely on the indefeasibility given to the title under section 340 to claim that the area encroached upon remains part of his lot.

[37] In opposing the appeals, the plaintiff submitted that there is only one valid and legally binding decision on the parties and that is the second decision which resulted from the High Court order dated 22 September 1995 and which has never been challenged.

[38] Learned counsel for the plaintiff submitted that there was no breach of the Act by the High Court in hearing the plaintiff's appeal against the decision of the appeal board; in rendering the order dated 22 September 1995 and in remitting the matter to the deputy director for re-determination in accordance with law. And in re-determining the matter, the deputy director could not act in breach of the High Court order.

[39] The plaintiff contended that it has a right to appeal on points of law under s 19 of the Act. Therefore there was no excess of jurisdiction on the part of the High Court which would substantiate any collateral attack on the order dated 22 September 1995 in these proceedings. In any event, if the High Court had acted outside its powers in making the order dated 22 September 1995, the defendants should have appealed against and/or applied to set aside the order.

[40] It was further submitted for the plaintiff that:

(a) the defendants must take a positive step to challenge the High Court order, whether in the original proceedings or, in rare circumstances (which do not apply here) separate/collateral proceedings before attacking it on its alleged invalidity;

(b) this positive step has never been taken by the defendants;

(c) the defendants had instead willingly participated in the resulting proceedings leading to the second decision;

(d) hence the defendants cannot challenge the High Court order and/or the second decision in these proceedings;

(e) this is not a decision of a tribunal that the defendants have ignored but a sealed and perfected High Court order;

(f) in light of the wilful failure of the defendants to positively challenge the High Court order, this court must find that the defendants are bound by the terms therein and the consequential events;

(g) the learned JC in these proceedings cannot go into the merits of the High Court order dated 22 September 1995 and/or the second decision; and

(h) the second defendant had never pleaded PAPA and its relevance to these proceedings and therefore is barred from doing so at this late stage.

OUR FINDINGS

[41] We took the view that these appeals could be resolved by applying the principles laid down by the Federal Court in *Badiaddin*.

[42] In *Badiaddin*, the appellants were the registered co-owners of a piece of Malay reservation land ('the land'). The appellant's business associate, one Ismail bin Omar was in need of funds. To assist Ismail and to secure a loan advanced by the respondent to Ismail, the appellants charged the land to the respondent. Upon Ismail's breach of the loan agreement, the respondent obtained an order of sale of the land. The appellants applied to the High Court for a declaration that the charge as well as the order of sale was invalid as being in contravention of the Malay Reservation Enactment (FMS Cap 142) ('the Enactment'). On 21 March 1988, the High Court granted the declaration sought and upon the respondent's summons filed in the same proceedings wherein s 66 of the Contracts Act 1950 was invoked, the judge also made an order that the appellants repay all monies lent to Ismail ('the first order'). On 8 October 1990, the judge made another order declaring that the appellants had received an advantage or benefit directly from the respondent and further ordered that the land be sold and the proceeds of sale be utilised to pay the balance outstanding on the loan made to Ismail ('the second order').

[43] The appellants commenced proceedings afresh to have the second order declared null and void and to have it set aside on the ground that it contravened s 13 of the Enactment. The appellants contended that they need not comply with appeal procedure and that they are entitled to the remedy *ex debito justitiae*. The respondents on the other hand contended that the appellants were precluded from questioning the validity of the second order on the ground of res judicata and estoppel. The judge held that it would be unjust to estop the appellants from challenging the second order by reference to res judicata or any other branch of the doctrine of estoppel because the second order was plainly invalid, it having been made in contravention of an express provision of a written law ('the third order').

[44] Aggrieved by the decision of the High Court, the respondent appealed

to this court. This court allowed the appeal on the sole ground that the High Court was *functus officio* and had no jurisdiction whatsoever to set aside the second order irrespective of any illegality in the order. On the appellants' appeal to the Federal Court, the appeal was allowed. The order of this court was set aside and the order of the High Court restored. For convenience, we reproduce below the judgment of Mohd Azmi FCJ where His Lordship said at p 409:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspects of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:
>
> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has long been laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
>
> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. ...

[45] We also reproduce below the judgment of Gopal Sri Ram JCA (as he then was) where at pp 427–429, His Lordship said:

> There are several authorities that deal with the validity of orders made in excess of jurisdiction by a court of unlimited jurisdiction and I find it sufficient to refer to two of them. The first is the decision of the Privy Council in *Meenakshi Naidoo v Subramaniya Sastri* LR 14 1A 160 which concerned a case where the High Court at Madras purported to entertain an appeal against the decision of a district judge which was not appealable. At the hearing before the High Court, neither the parties nor the court raised the question of jurisdiction. The High Court then reversed the district judge. On appeal to the Privy Council, it was held that consent or waiver could not cure the absence of jurisdiction. Sir Richard Baggallay, when delivering the advice of the Board said (at p 166):
>
> > It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to Their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point, it may be convenient to refer to the judgment of Their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v Bull* LR 13 1A 144, as it in very concise term deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: 'The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and Their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties which without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which if objected to at the time, would have led to the dismissal of the suit'. In the present case, there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.
>
> The second authority is *Chief Kofi Forfie v Barima Kwabena Seifah* of which there is a note in [1958] 1 All ER 289. It is also a decision of the Judicial Committee, on an appeal from Ghana. Mr LMD De Silva when delivering the advice of the Board is reported to have said at p 290 as follows:
>
> > ... A court had inherent power to set aside a judgment which it had delivered without jurisdiction. Lord Greene MR in *Craig v Kanseen* [1943] 1 All ER 108

at p 113, after referring to several decisions, had said: A

> Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. B

Their Lordships were of the same opinion ...

...

It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case. C D

[46] The main principles that can be distilled from *Badiaddin*'s case are as follows: E

(a) even courts with unlimited jurisdiction have no authority to act in contravention of a statute;

(b) where a court made an order in breach of a statute, the order is made without jurisdiction; F

(c) no consent can confer jurisdiction on the court which does not possess jurisdiction;

(d) an order delivered without jurisdiction may be declared void and set aside in proceedings brought for that purpose; and G

(e) the party aggrieved by the order that is made in contravention of a statute need not avail itself of the appeal procedure.

[47] The issue before us was thus whether the High Court had the power or jurisdiction to hear the appeal against the decision of the Board which was purportedly filed under s 19 of the Act. Before moving to s 19, it is perhaps useful at this juncture to refer to some other provisions of the Act which are relevant to the appeal. H

I

[48] We begin with s 30 which reads:

> 30(1) Where the boundaries of a holding abutting on any part of the foreshore or the bank of any river have not been surveyed by right-lines immediately before the appointed day, then such boundaries shall be deemed to follow the line of any

survey traverse made by or on behalf of the Director of Survey before the appointed day for the purpose of determining the line of such foreshore or bank (being a traverse which immediately before the appointed day was still effective for that purpose):

Provided that —

...

(2) Where any permanent works or improvements for the purpose of lawfully diverting water from any river have prior to the appointed day lawfully been constructed by the proprietor of any holding abutting on the bank of any river and such works or improvements were in use on the appointed day, the land upon which such works or improvements were constructed shall be included within the boundaries of such holding.

(3) Any person aggrieved by the determination of any boundary under subsection (1) or (2) on the ground that the survey traverse referred to therein does not follow the course of any foreshore or bank or that permanent works or improvements have been excluded from the boundaries of a holding may at any time before the title to such holding has become indefeasible pursuant to Part VII apply to the Director under section 28.

[49] Section 28 provides:

28(1)Subject to section 29, any person interested in any holding who claims that any boundary mark relating thereto is incorrectly placed may apply to the Director in Form C, specifying the grounds of his claim and the evidence in support thereof.

(2) ...

(3) Where the Director is satisfied that the claimant has a *prima facie* case he shall proceed to hold an enquiry under this Act.

[50] In respect of ascertaining the boundaries of holdings, the powers of the Director are found in s 25 which states:

25 For the purpose of ascertaining the boundaries of holdings and preparing and maintaining an Interim Register under this Part, the Director shall have and may exercise (but without prejudice to the generality of the powers conferred on him by section 9) the following powers:

(a) ...

(b) ...

(c) where there is any dispute concerning the boundaries of a holding or where the Director is in doubt concerning the correctness of any such boundary, to hold an enquiry in respect thereof in exercise of the powers conferred on him by Part II;

[51] As for the general powers of the director, it is stipulated in s 9 and

sub-s (1)(a) reads:

> 9(1) The Director and the Deputy Director shall have and may exercise the following powers:
>
> (a) for the purposes of this Act to enter upon and have free access to any land in the State, and to make enquiries and to do or cause to be done all things necessary for effecting the survey demarcation of the boundaries of any such land;

[52] Special provision relating to enquiries by the director is provided for under s 27 which reads:

> 27(1) Whenever in exercise of the powers conferred on him by section 25(c) the Director shall hold an enquiry, any person interested may appear before the Director either personally or by an advocate and solicitor.
>
> (2) ...
>
> (3) Any order made in respect of any holding in any enquiry held by the Director under this Part shall be final and conclusive with respect to the area and boundaries of such holding and shall be binding upon all persons having or acquiring any interest therein and upon their successors in title.

[53] As regards the boundary, there is also s 29 which states:

> 29(1) Where the boundary of any holding has been or is deemed to have been finally ascertained or confirmed under the Boundaries and Survey Maps Ordinance SS Cap 130, the Malacca Re-surveys Ordinance SS Cap 132 or the Penang Corrected Re-surveys Ordinance 57 of 1950, such boundary shall be deemed for the purposes of this Part to be final and conclusive and shall not be called in question in any proceedings under this Act.

[54] Section 15 provides for appeals against the decision given by the director and it reads:

> 15 Any person who is aggrieved by any decision given by the Director under this Act may, unless such decision relates to a matter in which the decision of the Director is final, within one month therefrom appeal to the Board by lodging with the secretary to the Board an application in duplicate in Form B.

[55] The power of the board to hear and determine any appeal lodged under s 15 and to make such order thereon as the board may think just, is provided under s 16 of the Act.

[56] As for s 19, it sets out the procedure for appeals on points of law as follows:

19(1) An appeal shall lie to the Court on a point of law from any decision of the Board.

(2) An appeal under subsection (1) may be brought by any party aggrieved by the decision of the Board, or by the Director, and shall be brought before the Court by means of a notice of appeal lodged within six weeks after the date on which the decision of the Board was made.

(3) The procedure governing appeals to the Court under this section shall be the same as for appeals to the Court from decisions of Sessions Courts in civil matters.

[57] The board and the director has the power to review their decision under s 21 of the Act which reads:

21 A decision or order of the Director or the Board may be reviewed, varied or set aside by the Director or the Board, as the case may be, in any of the following cases:

(a) where the decision or order was made in consequence of any fraud, misrepresentation or mistake;

(b) where fresh evidence of a material nature, which could not by the exercise of reasonable diligence have been produced when the decision was given or the order was made, is available;

(c) when the decision or order was made in the absence of any necessary or proper party whose absence was not due to any default or neglect on his part; or

(d) when, in the opinion of the Director or the Board, as the case may be, substantial injustice has been occasioned by the decision or order.

[58] From the above, it can be seen that ss 27(3) and 29(1) read with s 15 clearly provide that the decision of the director in respect of boundaries is final and conclusive. Hence, there can be no appeal from the decision of the director to the board on the ascertainment of boundary of Lot 78.

[59] Further, s 16 provides as follows:

16 The Board shall have and may exercise the following powers:

(a) all the powers conferred on the Director by this Part;

(b) power to hear and determine any appeal lodged under section 15 and to make such order thereon as it may think just;

(c) power to award costs to parties in proceedings before the Board: ...

[60] Of significance is para (b) of s 16 which refers to power of the board to determine and to hear any appeal lodged under s 15. Going back to s 15, any person aggrieved by any decision given by the Director under the Act may, *unless such decision relate to a matter in which the decision of the director is final*,

appeal to the board. (Emphasis added.)

[61] Since the decision of the director in respect of ascertaining the boundaries of holdings is final under s 27(3), no appeal shall lie to the board from the decision of the director in respect of the determination of the boundary of Lot 78. Put another way, pursuant to ss 15 and 16(b) of the Act, the board had no power to hear the plaintiff's appeal against the decision of the director in respect of the determination of the boundary. It follows that there could never be any further appeal to the High Court against the decision of the Board in relation to boundaries.

[62] The plaintiff nevertheless contended that the appeal to the High Court which resulted in the order dated 22 September 1995 was an appeal on points of law which was allowed under s 19(1) of the Act. Learned counsel referred to the decision of the Board which agreed with the argument of the defendants that the plaintiff's appeal was caught by s 27(3) of the Act. This decision, according to learned counsel, was truly a finding of law.

[63] The learned JC agreed with the plaintiff. His Lordship ruled that because there was nothing to show that the High Court in 1995 decided on the facts, it must necessarily be on a point of law. The learned JC referred to the order dated 22 September 1995 which stated that '... ADALAH DIPERINTAHKAN PADA HARI INI bahawa Rayuan pihak Perayu/Plaintif dibenarkan DAN ADALAH DIPERINTAHKAN bahawa Mahkamah meremitkan kes ini kepada Pesuruhjaya Hakmilik Tanah Daerah untuk menentukan perkara yang sama selaras dengan undang-undang dan satu siasatan yang awal diadakan', to hold that the order ex facie showed that the complaint before the High Court must be on a point of law.

[64] The learned JC further held that the High Court had the jurisdiction to grant the order dated 22 September 1995 as the High Court had all the powers of the body appealed from and in this case, the board, which had the power to review, vary or set aside its decision under s 21 of the Act.

[65] With respect, we disagreed with the learned JC. Firstly, in our judgment, s 21 is not applicable to the facts of the instant case. As set out above, s 21 empowers the director or the board to vary or set aside its own decision on the grounds stipulated under paras (a)–(d). It is a power that is exercisable at the instance of the director and the board. The order of the High Court dated 22 September 1995 and the remittance by the High Court for the matter to be re-determined by the commissioner does not fall under any of the circumstances enumerated under paras (a)–(d) of s 21 of the Act.

[66] Secondly, as regards s 19(1), it must be emphasised that the provision

speaks of appeal from the decision of the board. There must, at the outset be a competent appeal under s 15 before the board on which the board made its decision. Against the decision of the board made pursuant to s 16(b), an appeal shall then lie to the High Court on points of law pursuant to s 19(1). Since s 15 excludes appeals from the decision of the director on the determination of boundaries, there can be no appeal to, and no decision of the board. If there was no decision of the board, the issue of an appeal to the High Court on a point of law from the decision of the board (insofar as an appeal is excluded by s 15), did not arise.

[67] The learned JC relied on the words 'selaras dengan undang-undang' contained in order dated 22 September 1995 to hold that the appeal before the High Court must be on a point of law. In our view, the wordings 'selaras dengan undang-undang' per se were not conclusive that the appeal before the High Court was on points of law.

[68] The proper approach is to look at the substance and not at mere labels. The court order dated 22 September 1995 merely stated 'selaras dengan undang-undang'. That was the label. What then was the substance?

[69] The plaintiff submitted that when the board, pursuant to s 27(3) of the Act, dismissed the plaintiff's appeal, that was purely a finding of law. With respect, the order dated 22 September 1995 did not refer or remit the matter to the board. Had there been any point of law which came up to the High Court from the findings of the board, then the matter ought to be remitted to the board for the board to rectify the error in its findings and for the board to re-determine the matter according to law.

[70] But that was not the case. The order of the High Court directed the commissioner instead to re-determine the boundary according to law, which suggests that the point of law arose, not in respect of the decision of the board but in respect of the decision of the commissioner/director in determining the boundary. The substance or the effect of the order dated 22 September 1995 did not therefore support the plaintiff's position that the appeal to the High Court was on a point of law from the decision of the board.

[71] Further, points of law must necessarily relate to specific issues of law as determined by the High Court which required application or adherence by the commissioner when the matter was remitted for re-determination. Nevertheless, the order did not define nor make any mention of the points of law to be applied by the commissioner upon the case being remitted. Neither was there any indication in the second proceedings before the deputy director which alluded to the points of law as determined and/or directed by the High Court. Since there was nothing on record, we were of the view that in substance

and in effect, there was no determination of points of law which culminated in the High Court order dated 22 September 1995 and the second decision.

[72] Flowing from the above, it was our view that the High Court lacked jurisdiction to hear the appeal and to grant the order dated 22 September 1995. The order was contrary to statutory provision. The order and by extension, the second decision were null and void.

[73] Applying the principles in *Badiaddin* (which was affirmed by the Federal Court in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1), it did not matter that the order has been perfected; that the defendants took part in the enquiry which resulted in the second decision and that the defendants failed to take steps to set aside or to appeal against the order dated 22 September 1995. It also did not matter that the defendants did not collaterally challenge the order much earlier. The end result would be that the first decision must be upheld as it had not been effectively set aside in accordance with the Act.

[74] As for the PAPA and s 418 of the NLC, these issues were not canvassed in the High Court as they were not pleaded in the second and third defendants' statement of defence and were not posed as one of the questions for determination under the O 14A/O 33 application. The second and the third defendants had also not advanced the PAPA and s 418 of the NLC as one of the grounds of appeal in their memorandum of appeal.

[75] We found that it was too late in the day for the second and third defendants to raise the PAPA and s 418 in their submissions before us, when they had every opportunity to set out these issues as one of the questions for determination by the High Court pursuant to the O 14A/O 33 application (see *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697; *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492; *Tengku Ismail bin Tengku Sulaiman (suing as father of Tengku Iskandar Shah bin Tengku Ismail, deceased) & Ors v Sia Cheng Soon & Anor* [2006] 5 MLJ 228).

CONCLUSION

[76] Whilst court orders are to be obeyed and respected until they are set aside, we were satisfied that the instant case is a fit and proper case for the defendants to mount a collateral attack on the order dated 22 September 1995 and the second decision without going through the appeal process.

[77] The right to appeal is a substantive right created by statute (see *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549; [1995] 3 CLJ 485;

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771; [2008] 5 CLJ 1). The learned JC erred in concluding that there was no element of illegality in the order dated 22 September 1995 without proper consideration of ss 15, 16 and 27(3) of the Act which expressly exclude appeal. Because of the finality provisions in the decision of the deputy director, there was no competent appeal before the High Court. In the circumstances, we ruled that the order of the High Court dated 22 September 1995 and the second decision were a nullity as they were made in defiance of a substantive statutory provision.

[78] In the light of all the above, we unanimously allowed the appeals with costs and we set aside the order of the learned JC.

Appeals allowed with costs; order of learned JC set aside.

Reported by Fatin Mohd Ismail